

December 3 , 2014

Scott Chadwick
Chief Operating Officer
City of San Diego
202 C Street, MS 9A
San Diego, CA 92101

Re: Your Request for Advice
Our File No. A-14-191

Dear Mr. Chadwick:

This letter responds to your request for advice regarding the conflict of interest provisions of Government Code section 1090.¹ Please note that we do not provide advice on any other conflict of interest restrictions, if applicable, outside the Political Reform Act (the “Act”)² and Section 1090. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are complete and accurate. If this is not the case, then our advice could be different.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General’s Office and the San Diego County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice “is not admissible in a criminal proceeding against any individual other than the requestor.” (See Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit Councilmember Sherri Lightner from voting to authorize the Mayor to allow the City of San Diego to use a cooperative procurement agreement for wireless services where the amount requested exceeds \$1,000,000?

¹ All statutory references are to the Government Code, unless otherwise indicated.

² The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

No. Section 1090 does not prohibit Councilmember Lightner from voting to authorize the Mayor to allow the City of San Diego to use a cooperative procurement agreement for wireless services where the amount requested exceeds \$1,000,000.

FACTS

You are the Chief Operating Officer of the City of San Diego ("City") requesting advice on behalf of the City and Councilmember Sherri Lightner regarding a potential conflict of interest under Section 1090.

The City would like to enter into a cooperative procurement agreement for the purchase of wireless goods and services from four providers, including Verizon. A cooperative procurement agreement, commonly referred to as a "piggyback contract," allows public agencies, such as the City, to use the terms, conditions, and pricing of a contract for goods or services procured by another agency instead of initiating a new competitive bidding process. Such arrangements are authorized under Section 22.3208(d) of the San Diego Municipal Code ("SDMC"). However, the City's Purchasing Agent is required to first certify that the cooperative procurement agreement is in the City's best interests, to its economic advantage, and in substantial compliance with the City's competitive bidding requirements.

The City's Purchasing Agent has recently reviewed the wireless communication and equipment contract that the Western States Contracting Alliance ("WSCA") awarded to multiple wireless communications providers including Sprint, AT&T, Verizon and T-Mobile. Following the execution of that contract, the State of California entered into separate "Participating Addendums" with each of the wireless communications providers. The Participating Addendums include terms and conditions specific to the State of California and expressly allow municipal entities, such as the City, to piggyback on the Agreement.

The City's Purchasing Agent determined that use of the WSCA Agreement, as authorized under the terms of the Participating Addendums, satisfied the City's municipal code requirements. As such, the City can now use the terms, conditions, and pricing of the WSCA Agreement. The City Council will not determine which of the four wireless providers the City departments use. Instead, City departments will determine which provider best fits their needs based on coverage, operational needs and cost, subject to approval by the City's Purchasing Director.

Under Section 22.3206(c) of the SDMC, the City Council is required to approve contracts for goods and services that exceed \$1,000,000 as awarded, amended, or extended. The City has a contract with Sprint that terminated on October 24, 2014. Sprint currently provides wireless service for approximately 1,400 cell phones, 1,100 PDAs, 1,800 data modems, and 1,900 GPS modems.

By email dated November 19, 2014, Steve Lastomirsky described the City's current use of Verizon wireless and the nature of the City Councils' vote with respect to wireless services under the WSCA Agreement as follows:

"If the City Council votes to authorize the Mayor to allow the City to use the WSCA wireless agreement at the requested dollar amount (which exceeds \$1 million dollars), the Council would not expressly be approving the public safety departments' use of Verizon as the company providing wireless services. Rather, the Council would be authorizing departments (including the Police and Fire Departments) to use any of the four service providers available under WSCA and the California Participating Addendum (AT&T, Sprint, T-Mobile and Verizon). The decision on which provider to use would be based on coverage, operational needs and cost, subject to approval by the City's Purchasing Director. However, because the public safety officials have determined that Verizon best meets their critical coverage needs and operational requirements, and the Police Department already switched from Sprint to Verizon for those reasons, it is likely that the Police Department and other public safety departments would use Verizon. The Police Department did not initially require Council approval to use Verizon because the dollar amount it used did not exceed \$1 million, but the Police Department is likely to exceed that amount in coming months."

On September 16, 2014, the City Council was scheduled to consider a request from the City's Department of Information Technology to authorize the Mayor to utilize the WSCA Agreement on behalf of the City. The matter was continued after Councilmember Lightner recused herself based on her spouse's position as a consultant to a company (Networkfleet) that was acquired by a subsidiary of Verizon (Verizon Telematics) in June 2012. Councilmember Lightner's spouse has been working continuously as an employee or as a consultant for that company for more than 14 years. The purchase did not affect her spouse's consulting relationship with the company. The spouse's contract does not provide for increased compensation if the City uses Verizon wireless services, nor does it contain any provision for a bonus. There are no facts to suggest that his job or the continued viability of the company using his consulting services is in any way dependent on the City Council approving Verizon's increased provision of services to the City.

ANALYSIS

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended not only to strike

at actual impropriety, but also to strike at the appearance of impropriety. (*City of Imperial Beach v. Bailey* (1980) 103Cal.App.3d 191, 197.)

Under Section 1090, the prohibited act is the making of a contract in which the official has a financial interest. (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

We employ the following six-step analysis to determine whether, if elected, you will have a conflict of interest under Section 1090.

Step One: Is Councilmember Lightner subject to the provisions of Section 1090?

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” City Councils and their members are plainly covered by this prohibition. (See, e.g., *Thomson, supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.)

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.)

Here, the City Council will be voting to authorize the Mayor to allow the City to use the WSCA Agreement (and the California Participating Addendum) as the amount requested exceeds \$1,000,000, and thus needs City Council approval pursuant to SDMC 22.3206(c).³ A contract is squarely at issue in this matter.

Step Three: Will Councilmember Lightner be making or participating in making a contract?

According to your facts, the City’s Police Department is currently using Verizon through the WSCA Agreement and did not need City Council approval because the amount for the services did not exceed \$1,000,000. However, the City now anticipates that the Police Department’s use of Verizon will exceed that amount in the coming months. The City also anticipates that other public safety departments will also begin using Verizon. As a result, under

³ SDMC 22.3206(c) states “[u]nless otherwise provided in this Division, *contracts for goods* and *contracts for services* that exceed \$1,000,000 as awarded, amended or extended, must be approved by the City Council.” (Emphasis in original.)

SDMC 22.3206(c), the City Council will need to approve the newly anticipated monetary obligation for wireless services under the WSCA Agreement. Thus, the City Council, including Councilmember Lightner, will participate in amending the current contractual obligation under the WSCA Agreement to allow the City to exceed the \$1,000,000 limit.

Step Four: Does Councilmember Lightner have a financial interest in the contract?

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig, supra*, at p. 333.) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

According to the facts, Councilmember Lightner’s spouse is currently a consultant to a company recently acquired by a subsidiary of Verizon. Initially, we note that as a general rule, a member of a board or commission always has a financial interest in his or her spouse’s source of income for purposes of Section 1090. (See, e.g., 78 Ops.Cal.Atty.Gen. 230, 235 (1995).) Therefore, our analysis focuses on the potential financial impact of the City Council’s decision with respect to the spouse of Councilmember Lightner.

In *Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4th 208, the First District Court of Appeal found that, under Section 1090, “if the contract itself offers no benefit to the official, either directly or indirectly, then the official is not financially interested in the contract” (*Id.* at p. 228.) In analyzing the “financial interest” element of Section 1090, the court noted that in prior cases where a prohibited conflict was found, “the party who was found to have had a prohibited financial interest received a tangible benefit that arose out of the contract at issue.” (*Id.* at 226.) The court further noted that, although the public official who was alleged to have violated Section 1090 participated in his official capacity in making a contract with his private employer, there was no evidence that the contract would affect the official’s “salary, benefits, or status.” (*Id.* at p. 227.)

Here, consistent with the findings in *Eden*, the main issue distills to whether the increased monetary amount authorized under the WSCA Agreement will benefit Councilmember Lightner’s spouse directly or indirectly in the form of a “tangible benefit” such as impacting his “salary, benefits, or status.” Based on the facts you have provided, we do not believe it will. For example, her spouse will not receive additional compensation as a result of the increased Verizon services nor does his contract provide for any type of bonus. He has a longstanding relationship with the company as an employee and/or consultant so there is no reason to believe his job is dependent on the decision of the City Council. In addition, there is nothing to suggest that the

viability of the company he provides consulting services to is dependent on the ability of Verizon to provide the City with additional wireless services.

We do not believe Councilmember Lightner has a prohibitory financial interest in the WSCA Agreement, allowing the City departments to use its terms and conditions to choose the wireless provider that best fits their needs based on coverage, operational needs and cost. Accordingly, Section 1090 does not prohibit Councilmember Lightner from voting on whether to authorize the Mayor to allow the City to use the WSCA Agreement (and the California Participating Addendum) for an amount that exceeds \$1,000,000.⁴

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Jack Woodside
Senior Counsel, Legal Division

JW:jgl

⁴ Because we find that Councilmember Lightner does not have a financial interest in the contract at issue, we do not find it necessary to analyze remote interests that may potentially apply or the rule of necessity.